JD(SF)-47-03
Denver, Colorado

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

WAL-MART STORES, INC.
The Respondent

and

Cases 27-CA-18206-2
27-CA-18206-3
27-CA-18206-4

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL NO. 7, UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION
The Charging Party

Michael Cooperman, Esq., of Denver, Colorado
for the General Counsel.

Bradley C. Bartels, Esq., of Denver, Colorado
for the Charging Party.

W. V. Bernie Siebert, Esq. of Denver, Colorado
for the Respondent.

DECISION

Statement of the Case

CLIFFORD H. ANDERSON, Administrative Law Judge: I heard the above captioned case in trial in Denver, Colorado, on April 8 and 9, 2002, pursuant to a consolidated complaint and notice of hearing issued by the Regional Director of Region 27 of the National Labor Relations Board on November 27, 2002. The complaint is based on charges filed by the United Food & Commercial Workers Union Local No. 7, United Food & Commercial Workers International Union (the Charging Party or the Union) against Wal-Mart Stores, Inc., (the Respondent) on September 23, 2002, and docketed as Cases 27-CA-18206-2, 27-CA-18206-3, and 27-CA-18206-4.

The complaint, as amended, alleges, and the answer denies, inter alia, that the Respondent on or about September 11 and 15, 2002, at its Stapleton, Denver, Colorado Store, engaged in various acts and conduct violating Section 8(a)(1) of the National Labor Relations Act (the Act) and on or about September 11, 2002, assigned extra supervision to monitor and restrict employee movement in its store and monitored an employee closely on that date in each case because its employees joined and/or assisted the union and engaged in concerted activities and to discourage employees from engaging in these activities. This latter conduct is alleged in the complaint to violate Section 8(a)(3) and (1) of the Act and is denied in the answer.

Findings of Fact

Upon the entire record herein, including helpful briefs from the Respondent, the Charging Party, and the General Counsel, I make the following findings of fact.[1]

I. Jurisdiction

The Respondent is a corporation with its headquarters in Bentonville, Arkansas and retail stores throughout the United States, including its store number 3533 on Smith Road, Denver, Colorado (herein the Stapleton store or the store), where it is engaged in the retail sale of general merchandise. In the course of its business operations, the Respondent annually enjoys revenues in excess of $500,000 and annually purchases and receives at its Stapleton store, goods, materials, and services valued in excess of $50,000 directly from points and places outside the State of Colorado.

Based on the above, there is no dispute and I find the Respondent is and has been at all times material an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. Background

In recent years Denver, Colorado built a new airport and closed its older airport located in Stapleton, a part of Denver. Following closure of the older airport, its substantial grounds were redeveloped. The Respondent, a retailer with many large retail general merchandise stores throughout the United States, established a “supercenter” or very large store (comprising almost 5 acres of sales floor with over an acre of ancillary space) that offers general merchandise and groceries, in the Stapleton redevelopment area. The staff was hired and trained in a five-week period proceeding its opening to the general public on August 14, 2002.

At relevant times the Stapleton store manager was Mr. Ed Hohlt. Kathy McGuire, Jim Wynn and Kim Stewart were its store co-managers. Its management team also included sixteen assistant mangers, 25 department managers, 12 customer service managers, and 2 overnight assistant managers. The facility was initially open 24 hours per day, 7 days per week to the public. On and after October 19, 2002[2], the store was closed to the public from midnight to 6 am each day. The store operated three shifts and employed approximately 450 non-supervisory employees.

The Charging Party is a large local union representing, inter alia, retail store employees in portions of Colorado State including the Denver and Stapleton areas.

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[1] As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

[2] All dates hereinafter refer to 2002 unless otherwise indicated.

B. Summary Description of Events

Mr. Joe Walker was one of the early hires or pre-opening employees of the Respondent at the store. He was employed as a stocker on the night shift, which for him[3] ran from 10 pm to 7 am. Mr. Walker came to the view that union representation at the Respondent's store might be desirable. On or about September 9 or 10, 2002, he telephonically contacted the Union's offices and left a message requesting he be called. Ms. Joella Risbon, a union organizer, called him back and the two discussed the possibility of organizing the Respondent's employees. The two arranged to meet in the store parking lot later that day around midnight when Walker would be on break.[4]

Ms. Risbon and her organizing director, Mr. Noberto Ricardo, came to the store parking lot at the designated time. Mr. Walker apparently mentioned the upcoming parking lot meeting with a union organizer to fellow employees because when he took his work break and entered the parking lot, there were both a number of employees who were simply exiting the building while taking their break and a number of employees who wanted to observe or participate in the meeting with the union organizers.

Walker and perhaps 15-20 other employees had an informal meeting with Risbon and Ricardo in the parking lot. Walker requested and the Union agents passed out authorization cards. Some were signed and immediately returned. Either in the parking lot at that time or by telephone the morning after, Walker and Risbon do not agree on the details and timing of the arrangements, Walker and Risbon agreed to have a breakfast meeting on September 11 at the Village Inn Restaurant, a local establishment, so that interested employees to meet with the Union and learn more about the process.

On the morning of September 11 at the designated time, union agents Risbon and Ricardo met at the restaurant with Walker and a second employee, Ms. Debra Pinson, a fellow overnight stocker. Pinson had attended the parking lot meeting earlier and obtained, signed and returned a union authorization card to the Union.

Store manager Ed Hohlt, as of the time of the trial, herein, the manager of a different store of the Respondent in the area, testified that he was awakened by a telephone call around midnight on September 9, from store overnight manager Chris Fewel who reported that an employee had received a business card from a union organizer that evening. Hohlt instructed Fewel to report the event to labor relations in headquarters. When Hohlt came to work the following day, he in turn reported the event to headquarters labor relations and also to his district manager, Mr. Jim Mohan.

Mr. Hohlt recalled that he was instructed by headquarters labor relations:

> Basically to speak with individual associates, who worked on that particular -- on the evening and the crew, and again, just kind of restate our opinion, or our philosophy of unions, as a company. And then inform them of our open-door policy.

[3] The starting times of the various employees on the night shift were staggered. The times set forth above were identified by Walker as his scheduled starting and ending times.

[4] The time of the parking lot events are not precisely established. Whether the events occurred just before midnight on September 9, or after midnight in the early morning of the following day, or occupied portions of both dates, is not of consequence.

Consistent with his instructions Hohlt spoke with several employees on the evening of September 11. He recalled that he told employees that an employee had received a business card from a union organizer. He asserted that he had been instructed not to ask questions of employees and that he did not do so.

Hohlt spoke to employee Debra Pinson. When he raised the matter of the union organizer, he recalled she responded:

> "Oh, yeah, I'm aware that this stuff, this has been going on, and oh, by the way, there was a meeting this morning that I did attend, and I wanted to attend it because I wanted to get both sides of the story, you know, I know your philosophy or Wal-Mart's philosophy on unions, but I also wanted to hear what they had to say." And she said that there were several people there, indicated six or seven, I don't recall exactly how many she said, but you know, that also indicated that they bought everybody breakfast, and so, yeah, I was going for the free meal.

Hohlt testified he responded:

> I informed her that, you know, "Debbie, I can't ask you any questions, but you know, you can tell me anything you want . . ." and I would also -- she also shared with me that her opinion of the union, because she had worked for unions before, and I encouraged her to share that opinion with the other associates.

Ms. Pinson placed her conversation with Hohlt as occurring after the shift meeting described below. She testified:

> He stated he knew about the meeting. He wanted me to talk to the people regarding it because he knew that I had that respect and that I could talk them either way. He knew that. So, he was going to use me to, you know, go forth with the Wal-Mart policy on the one-sided coin. That's what it was down to.
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> Q. And you told him?
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> A. That I would talk to the people, but I would tell them they needed to get both sides of the story.

Hohlt testified that after learning of the breakfast meeting from Pinson he called headquarters labor relations again and reported what he had now learned. The labor relations' office prepared and sent to Hohlt that afternoon a talking paper to present to employees at shift meetings starting that evening. Hohlt testified he discussed the instructions he had received with his district manager and his management staff.

At the shift meetings attended by the employees working on the particular shift, starting at the beginning of the night shift that evening, Hohlt presented the labor relations script. Present as well were the district manager and Mr. Ryan Larsen, a member of the Respondent's headquarters labor relations staff that attended due to the union organizing campaign. Hohlt testified he read the talking points document verbatim to the assembled employees and did not add or detract from its language. Other witnesses suggested he made additional remarks as discussed below. The "talking points" document at issue was entered into evidence.

The printed remarks commenced:

- I hope you know by now that I'm committed to communicating to all of you about things that affect you and our store.

- Today, I want to tell you that some concerned Associates have told me that some of our overnight Associates have been attending union meetings, in fact some attended a meeting on 9/11. I was told that the union even bought them breakfast. I would also tell you that I was told that we've had union organizers in our store overnight soliciting our Associates, not only in the store but out in front of the store as our Associates were on their breaks and lunches.

- I am also concerned because I was told that some Associates were being pressured by another overnight Associate to go [to] a union meetings [sic]. It's apparent that we have an overnight Associate who is interested in talking to people about going to meetings and in some cases making them feel pressured to do so.

The remarks included reminding the employees "Wal-Mart is strongly opposed to a third party representing and speaking for any of our associates."

On Friday, September 13, the Union sent store manager Hohlt a certified letter announcing that the union was "actively engaged in an effort to organize the employees" of the store and listed seven employees' names as volunteer organizing committee members. On the list were Walker, Pinson, Dancy and others. Hohlt received the letter on Monday, September 16, and thereafter along with Mr. Mohan, spoke to each employee named in the letter. Mr. Walker's last day of employment was September 16.

C. Individual Complaint Allegations of Section 8(a)(1) Violations of the Act

It is appropriate to address the allegations on a paragraph-by-paragraph basis. Each of the following paragraphs and sub-paragraphs are alleged to independently violate Section 8(a)(1) of the Act.

1. Complaint Allegation 5(a)

Complaint subparagraph 5(a) asserts:

> On or about September 11, 2002, on two occasions, [the] Respondent acting through Ed Hohlt, created the impression among its employees that their activities on behalf of the Union were under surveillance by [the] Respondent.

a. Evidence

Mr. Hohlt spoke to employees Harold Dancy, Joseph Walker, and Debra Pinson and others on September 11, 2002.

Mr. Dancy, as of the time of the trial no longer employed by the Respondent, was at relevant times an overnight stocker who attended the parking lot gathering and signed and returned an authorization card. He was one of the employees identified as a member of the

union's organizing committee on the September 13 letter sent to the store manager. Dancy testified that soon after the shift meeting at which Hohlt spoke, he was stocking in a grocery aisle when Hohlt approached him alone, took him into a different area in the store and initiated a conversation. Dancy recalled Hohlt asked him about the restaurant meeting with the Union. Dancy answered that he knew nothing about it and did not attend. The conversation then ended.[5]

Mr. Hohlt testified that after the shift meeting, he and District Manager Mohan went through the facility talking to various night-shift employees. They spoke to one-half dozen to a dozen employees including Walker and Pinson. They went as a pair on the advice of labor relations that two members of management be present when talking to employees to avoid factual disputes. Hohlt specifically denied having any "one on one" conversations after the shift meeting with employees and specifically denied talking with Dancy

Ms. Pinson, a current employee of the Respondent who denied that she had spoken to Hohlt about union activities prior to the nightshift meeting at which Hohlt spoke, described a one on one conversation with Hohlt soon after the shift meeting's end. She testified that Hohlt asked her what she knew about the Union since some employees wanted it. He also asked her to speak to employees about the Union and generally reprised his shift meeting remarks including the reference to his knowledge that two employees had attended a breakfast union meeting. Pinson testified that when the restaurant meeting was mentioned she told Hohlt that she had attended that meeting. He asked her why she had attended the meeting and she indicated she had wanted to hear both sides of the issue.

Hohlt recalled a conversation with Pinson after the shift meeting with Mohan also present. He did not recall the conversation in its entirety but characterized Pinson as supportive.

> I do recall Debbie Pinson saying specifically that, you know, 'yeah, if you've got any questions or anything you want to know at any time, call me at home, call me here, you can call me day or night, it doesn't matter, but I'd be willing to answer any questions you have.'

Mr. James Mohan, now a district manager in Alaska, testified that after the shift meeting he and Hohlt together spoke to many employees. He recalled their meeting with Pinson:

> I heard Ed [Hohlt] visit with Debbie a little about appreciating her comments, and Debbie explained that if we needed any information, we could call her. That she was not for the unions.

Mr. Walker testified that Hohlt and Hohlt's "boss" approached him soon after the end of the shift meeting at which Hohlt spoke. Mohan asked him if he had any concerns and Walker mentioned quite a few. Mohan suggested that Walker could "write a book" on them. Hohlt asked if he had personally wronged Walker and Walker responded that he had not.

Hohlt also recalled a similar conversation with Walker and Mohan. He recalled the conversation went on largely between Mohan and Walker. He testified:

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[5] Mr. Dancy also testified that at the shift meeting Hohlt said: "That if a union was in our store or around our store, he needs to be notified; him or another manager needs to be notified." This testimony is addressed in the portion of the decision dealing with the shift meeting remarks.

> I do recall asking Joe [Walker] if I personally did anything, or did anything to wrong him. In other words, you know, my -- is there something in my management style or some direction that I gave that was wrong, and that's when he indicated, no, nothing was wrong.

Mohan, recalled the conversation with Walker:

> My best recollection would be we discussed leadership. Joe was upset with a couple of assistant managers on the shift that he was working. He made comments that he thought leaders should lead. I explained to Joe that he was reading out of my same book. I appreciated him for his comments.

b. Analysis and Conclusions

The resolution of this allegation turns primarily on resolution of credibility. There are important variances in the testimony of events. Thus Hohlt, partially corroborated by Mohan, paints Pinson's attitude as sympathetic to the Respondent and hostile to the Union. Both Hohlt and Mohan allege that Pinson initiated her disclosures and generally acted as a volunteer willing to provide management with information respecting employee activities. Pinson disputes this testimony and denies, as Hohlt alleges, that she was the source of the information that employees had attended a breakfast meeting.

All counsel argued the case for favoring their witnesses skillfully. I have considered their arguments, the demeanor of the witnesses and the probabilities in light of the record as a whole. Generally, I credit the testimony of Hohlt and the testimony of Mohan where the testimony of the participants in the conversations described above differs. I found Hohlt's recollection to be more specific and consistent with the uncontested aspects of the chronology. I did not find Ms. Pinson's nor Mr. Dancy's demeanor matched that of Hohlt. Further, I found it less plausible, despite the General Counsel's arguments on brief, that Hohlt would have learned of the breakfast meeting through second-hand employee reports and falsely claimed that Pinson was the source.

This being so, I do not find that, on or about September 11, Hohlt created the impression of surveillance on the part of employees on two occasions apart from the shift meeting. I further find therefore that this allegation is without merit and shall be dismissed.

2. Complaint Allegation 5(b)

Complaint subparagraph 5(b) asserts:

> On or about September 11, 2002, [the] Respondent acting through Ed Hohlt, in a speech based on its "Talking Points", created the impression among its employees that their activities on behalf of the Union were under surveillance by [the] Respondent.

a. What Was Said

The threshold issue respecting this allegation is whether or not Hohlt, in speaking to employees, went beyond the wording of the talking-points document as several employees testified or whether – with the exception of the Respondent's open-door policy not relevant here – as the Respondent's witnesses testified, Hohlt stuck to a verbatim recital of the written words of the documents. Having considered the arguments of counsel, the demeanor of the witnesses

and the probabilities in light of the record as a whole, I find that Hohlt stuck to the text of the document. I have little doubt that under the circumstances, where he was reading a document prepared by headquarters staff in the presence of a headquarters staff member and his district manager that Hohlt would have stuck to the language provided. The allegation then turns on the language of the talking point document set forth in some detail, supra.

b. Analysis and Conclusions

Taking the headquarters prepared document as the definitive recitation of the remarks provided shift employees, I find that the Respondent clearly wrongfully created the impression among employees that the employees' union activities were under surveillance. Hohlt addressed every employee in the store in a series of shift meetings. It was surely obvious to employees that he was reading from a document adding significance to his words. Indeed Pinson testified credibly that Hohlt told the employees that he was reading information that had been provided to him by the home office. The unusual presence of the labor relations representative from headquarters and the district manager at the late evening meeting added further evidence to employees that important and official matters were under discussion.

Hohlt specifically informed employees at these meetings that the Respondent was getting detailed information respecting which employees were supporting the Union, when and where they were meeting and what they were doing at meetings. Thus, he told the employees in the meetings that he had been informed by "concerned Associates" that "some of our overnight Associates had been attending union meetings." He provided specifics: "[I]n fact some attended a meeting on 9/11. I was told that the union even bought them breakfast." He added: "I would also tell you that we've had union organizers in our store overnight soliciting our Associates, not only in the store but out in front of the store as our Associates were on their breaks and lunches." He made it clear that he had specific individuals in mind: "It's apparent that we have an overnight Associate who is interested in talking to people about going to meetings and in some cases making them feel pressured to do so." All of this was done in an address that included a reminder to employees that the Respondent was "strongly opposed" to its employees being represented by a labor organization.

Counsel for the Respondent correctly identified the Board's standard for such allegations as whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance. *South Shore Hospital*, 229 NLRB 363 (1977). The General Counsel and the Charging Party cite numerous cases for the proposition that the degree of detail concerning employees activities, i.e. the category of employees involved, the places of meetings with the union agents and the fact that the union bought employees breakfast, reasonably created in the employees hearing this official report the belief that the Respondent was surveilling union activities. See, e.g. *Newlonbro, LLC (Connecticut's Own) Milford*, 332 NLRB 1559 (2000); *Ichikoh Mfg.*, 312 NLRB 1022 (1993); *Firmat Manufacturing Corp*. 255 NLRB 1213 (1981).

Counsel for the Respondent seeks to distinguish such cases by asserting that the statements made by the Respondent's agent, Hohlt, to the shift meeting attendees respecting employee union activities were attributed by him to someone who had reported the activities to management. I find that from the employees' perspective – the proper focus of the analysis – Hohlt's statements made it clear that the Respondent was obtaining detailed, specific reports respecting employees union activities and, indeed, was likely to continue to do so. This is sufficient in my view to sustain the violation alleged.

Counsel for the Respondent also notes that Hohlt's remarks also contained assertions of employees' rights to engage in such activities. I do not find the comments made in these regards sufficient to rise to the level of a defense to or otherwise ameliorate the surveillance violation. Further, the meeting viewed as a whole was clearly one which the Respondent cloaked in substantial importance by the formal document reading, as well as the presence of the industrial relations representative from headquarters and the presence of the Missouri-based district manager. Finally, in the same remarks, the Respondent repeated its openly held view that it was strongly opposed to its employees selecting a union to represent them. When a meeting is held attended by headquarters and district level officials in which the highest store level official reads from a prepared document, employees reasonably understand a matter of importance is being discussed. When employees' union activities are described in detail and specificity and the employees are told that the Respondent strongly opposes union representation for its employees, a general statement of the employees right to engage in such activities is not sufficient to shelter the Respondent from violations such as the one at issue herein.

I find the General Counsel has established that the Respondent has violated Section 8(a)(1) of the Act by the conduct alleged in paragraph 5(b) of the complaint.

3. Complaint Allegation 5(c)

Complaint subparagraph 5(c) asserts:

> On or about September 11, 2002, [the] Respondent acting through Ed Hohlt and James Mohan, verbally harassed an employee because of the employee's support for the Union.

Hohlt and Mohan testified respecting their conversations with employees after the shift meeting. The two denied harassment of employees. That testimony has been credited, supra.

Mr. Walker testified to a conversation with the two representative of management as described supra, however I do find their conduct rose to the level of harassment violating the Act. The testimony of Mr. Dancy and Ms. Pinson respecting meetings with these two individuals has been discredited, supra. I make the same credibility findings here based on the analysis set forth supra. I therefore find that the General Counsel has failed to meet his burden of proof with respect to the allegations of complaint paragraph 5(c).

4. Complaint Allegation 5(d)

Complaint subparagraph 5(d) asserts:

> On or about September 11, 2002, [the] Respondent acting through Ed Hohlt, asked employees to engage in surveillance of their co-workers' union activities on behalf of [the] Respondent.

Mr. Harold Dancy testified to two conversations with Hohlt following the shift meeting at which union activities of employees were discussed. The first meeting was with Hohlt when he approached Dancy alone of the store floor, took him to another area of the store and asked him about the meeting of employees with the Union at the Village Restaurant. Mr. Dancy further recalled that Hohlt asked him to report to management if the Union came around or was seem in the store. Mr. Hohlt, as discussed, supra, denied having had a conversation with Dancy alone after the shift meeting at which he spoke.

I have earlier credited Hohlt over Dancy respecting the conversation noted. I make the same findings here based on the analysis set forth supra. I therefore find that the General Counsel has failed to meet his burden of proof with respect to the allegations of complaint paragraph 5(d).

5. Complaint Allegation 5(e)

Complaint subparagraph 5(e) asserts:

> On or about September 11, 2002, [the] Respondent acting through Ed Hohlt coerced an employee by requesting that she talk to fellow employees to tell them that a union was not necessary.

Ms. Pinson's version of the conversation at issue as well as the Respondent's credited denials are set forth above in the consideration of complaint paragraph 5(a). Based on those credibility resolutions and the analysis and conclusions respecting complaint paragraph 5(a) I find that the Respondent did not improperly instruct Pinson to advocate the Respondent's position to employees. I find therefore that the General Counsel has failed to meet his burden of proof respecting this allegation and it will be dismissed.

6. Complaint Allegation 5(f)

Complaint subparagraph 5(f) asserts:

> On or about September 11, 2002, [the] Respondent acting through Ed Hohlt interrogated an employee about a union meeting.

Mr. Harold Dancy testified to two conversations with Hohlt following the shift meeting at which union activities of employees were discussed. The first meeting was with Hohlt alone when Hohlt came up to him alone of the store floor, took him to another area of the store and asked him about the meeting of employees with the union at the Village Restaurant. Mr. Dancy told Hohlt he did not attend the meeting and did not know about the meeting. The conversation ended.

Hohlt denied that he had a conversation after his shift remarks with Dancy or any other employees alone. His testimony in this regard was credited over that of Mr. Dancy supra. Based on those credibility resolutions and the analysis and conclusions respecting complaint paragraph 5(a). I find therefore that the General counsel has failed to meet his burden of proof respecting this allegation and it will be dismissed.

7. Complaint Allegation 5(g)

Complaint subparagraph 5(g) asserts:

> On or about September 15, 2002, [the] Respondent, through Dave Pekar, harassed an employee by closely following him as he was shopping on non-working time.

Mr. Walker testified to an almost comically close physical surveillance by department assistant manager Dave Pekar when Walker was off work and was shopping in the store's grocery area at the end of his September 15 shift. He also testified that essentially at all times

during his employment after his union activities were observed by the Respondent he was under surveillance by pairs of management representatives.

Mr. Pekar, now employed at a different store of the Respondent, testified that at the time of the events in question, although he knew the name of Walker, he did not recognize him on sight. Further he testified that he did not closely watch or follow anyone in the store that morning and became aware of the issue only when he learned later that day the Walker had "called the police on him."

There is little question that, given the identification of Walker by name by Hohlt as an employee actively supporting the Union in the store in meetings with management and supervision and after Hohlt's shift meeting remarks to employees, close tracking or following of Walker during his shopping in the store by an assistant manager would violate Section 8(a)(1) of the Act. The critical issue given the one-on-one, diametrically opposed testimony, is factual: Did the close physical monitoring actually occur?

Mr. Walker is a large, physically imposing black man. It is not probable he would easily blend into a crowd or be impossible to locate or identify once described. And, under all the circumstances, I find it would not be unlikely for Mr. Walker to have been identified not only by name, but also by size, sex and color in management meetings in which his activities were discussed. It is therefore at least somewhat unusual that Pekar would have known of Walker by name as well as known of his then-recent union activities but not been able to physically recognize him on sight.

Mr. Pekar denied surveilling Walker and further testified to puzzlement respecting Walker's contention that he was tracked closely in the store. But he also acknowledged that Walker had contacted the local police that morning and reported that something untoward had occurred and that Pekar was the agent of the Respondent involved. There is no doubt that Walker's version of events was not a subsequent construction of events to buttress earlier claims but rather was perceived and complained of to others hard upon its claimed occurrence.

Considering the probabilities, the record as a whole and, importantly, the demeanor of the two witnesses given the burden of proof the General Counsel bears, I credit Walker and find that in fact Pekar did closely monitor Walker's shopping as Walker testified. I discredit Pekar's testimony to the contrary. Walker's testimony convinced me that he was truthfully describing the events as he had experienced them. I realize that Mr. Walker's testimony concerning his being observed was not rich with objective details of time, place and circumstance and that his beliefs that he was being constantly observed is implausible. While mindful of all these unfavorable circumstances and in full consideration of the record as a whole, I find Walkers testimony of the events at issue here to be truthful and accurate. I also found that Mr. Pekar's testimony – strong and simple denial - was less convincing and, in my view again after consideration of his demeanor and the entire record, was simply the testimony of an individual determined to deny actions and events which he felt under all the circumstances he simply could not admit.

Given these findings, I find that the Respondent's agent in closely following, shadowing, or tailing Mr. Walker, who had recently been identified as a lead union supporter for employees in the store, violated Section 8(a)(1) of the Act by harassing or surveilling him because of his union activities. I sustain the General Counsel's complaint paragraph 5(g).

D. Individual Complaint Allegations of Section 8(a)(3) Violations of the Act

Each of the following paragraphs and sub-paragraphs of the complaint are alleged to violate Section 8(a)(3) and (1) of the Act due to Respondent's conduct allegedly undertaken because the employees joined and/or assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. At the hearing the General Counsel amended the complaint to add that the Respondent by engaging in the conduct alleged below: interfered with its employees' ability to engage in union activities.

1. Complaint Allegation 6(a)(i) and (ii)

Complaint subparagraphs 6(a)(i) and (ii) assert:

> 6(a) Beginning on or about September 11, 2002, [the] Respondent changed the terms and conditions of its employees by:
>
> (i) assigning extra supervisors to the night shift in order to monitor the union activities of its employees;
> (ii) restricting employee movement between departments during working time.

a. Complaint Paragraph 6(a)(i)

Various employees testified credibly that they observed an increase in supervision both by store staff and by staff from other Respondent stores who were present and observing work on the night shift in the period following the initiation of union activities. The Respondent put on testimony that the stocking and restocking system in the newly-opened store was not working well and the area's supervisory staff was called upon, in conjunction with other managerial efforts, to come to the store and provide both short-term staffing and experience and expertise to get the stocking system at the store working as it should. These witnesses credibly testified that they were at the store to deal with staffing and not to track or monitor employees' union activities.

The Respondent's counsel also argues that the fact that employees were in contact with the Union and that union officials were organizing the Respondent's employees was a matter of little consequence to the Respondent's management compared and contrasted to the critical need to insure that the store's products were coming out of its storage areas and being stocked on the retail shelves in a timely manner. The General Counsel and the Charging Party argue that the "flooding" of the store with management staff was part of a scheme to surveil and create the impression of surveillance of employees' union activities.

I find it difficult to conclude that: 1) the waking the store director in the middle of the night, 2) reporting on employee union activities to headquarters, and 3) sending the District Manager and a labor relations employee from headquarters to the store to attend shift meetings in which the Store manager gave the remarks described above - all this activity, reflects that management regarded employee union activity as of little consequence. Nonetheless, I also find that the supply and restocking difficulties described in the testimony were real and were the basis for the staffing increases observed by employees. I simply credit the testimony of those involved who testified that they were not in fact on site to monitor employees activities other than in association with addressing the stocking and supply problems the store was experiencing. I find therefore that, while the impressions of the employees that they were under

surveillance were honestly reported, there was a benign explanation for the circumstances and the Act was not violated. I shall therefore dismiss this subparagraph of the complaint.

b. Complaint Paragraph 6(a)(ii)

The General Counsel supports his allegation that employees were restricted in their movement between departments during working hours, on and after September 11, with the testimony of Mr. Walker, Mr. Dancy and Ms. Shelia Innocent. Walker testified that until that date he had regularly worked in various departments when requested to assist other employees. On and after September 11, he was instructed to stay in or return to his department. He testified he received such specific instruction by Supervisor Kathy McGuire to discontinue assisting a fellow employee in the grocery area and to return to his assigned work area in the dairy section.

Ms. McGuire testified that she directed Walker to return to his assigned area because he was not in fact assisting a fellow employee in an efficient manner but was rather inefficiently talking and working with another employee in a manner that was "more or less a hindrance" and that the reassignment was simply a "production issue" that she noticed and addressed. I credit her testimony as to what occurred and further credit her testimony that her remarks were not based on employee union activities.

Mr. Dancy and former employee Ms. Shelia Innocent testified that each heard announced for the first time over the public announcement system after the staff meeting at which union activities were discussed that employees should, in Ms. Innocent's recollection: "just stay in your own area that you worked in".

The Respondent offered testimony that the public announcement system was used for specific communication with individual employees as needed and appropriate. Counsel for the Respondent argues, on brief at 35, that the announcements described never in fact took place but that, even if they had, the totality of record evidence on the allegation is grossly insufficient to support a finding that employees were restricted in movement through the store because of their union activities. Counsel emphasized the problems with stocking that were under examination at the time on the night shift – the shift which is involved herein – involved management review of night-shift employee performance as well as other production and efficiency issues.

I agree with the Respondent that the government's evidence in support of this allegation is insufficient to meet the burden the General Counsel bears with respect to each unfair labor practice alleged. Here the record is not sufficiently developed to support a finding that employees were restricted in the movements or that such restriction to the extent it occurred was due to employee union activities. I shall therefore dismiss this allegation.

2. Complaint Allegation 6(b)

Complaint subparagraph 6(b) asserts:

> On or about September 11, 2002, [the] Respondent acting through Michael Honn and John Sjobakken, monitored an employee closely throughout his shift because the employee had been engaged in union activities.

Mr. Walker testified that following the shift meeting he was closely monitored by at least two agents of the Respondent essentially to the end of his employment on September 15. He did not name either Michael Honn or John Sjobakken as monitoring his activities. Each testified

he did not monitor Walker's activities other than as part of the normal employee compliment. The General Counsel has not sustained his burden of proof respecting this allegation.

Remedy

Having found that the Respondent violated the Act as set forth above, I shall order that it cease-and-desist, post remedial Board notices and take certain affirmative action designed to effectuate the policies of the Act. Further the language on the Board notices will conform to the Board's recent decision in *Ishikawa Gasket America, Inc*., 337 NLRB No. 29 (2001), that notices should be drafted in plain, straightforward, layperson language that clearly informs employees of their rights and the violations of the Act found.

Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

a. Creating the impression among its employees that their activities on behalf of the Union were under surveillance by the Respondent,

b. Harassing an employee by following him closely as he was shopping in Respondent's Stapleton, Denver, Colorado store during non-working time.

4. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not otherwise violate the Act as alleged in the complaint and the complaint allegations not sustained shall be dismissed.

ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[6]

The Respondent, Wal-Mart Stores, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Creating the impression among its employees that their activities on behalf of the Union were under surveillance by the Respondent,

(b) Harassing an employee by following him closely as he was shopping during non-working time

(c) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

(b) Within 14 days after service by the Region, post at its Denver, Colorado facility copies of the attached Notice set forth in the Appendix[7]. Copies of the notice, on forms provided by the Regional Director for Region 27, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since, September 11, 2002.

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[6] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

[7] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

The allegations of the complaint not sustained herein shall be and they hereby are dismissed.

Issued at San Francisco, California, July 22, 2003.

_____
Clifford H. Anderson
Administrative Law Judge

JD(SF)-47-03
Denver, Colorado

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board had found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join or assist a union
Chose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Chose not to engage in any of these protected activities

Accordingly,

We give our employees the following assurances.

WE WILL NOT harass an employee by following him/her closely as he/she is shopping in our store during non-working time.

WE WILL NOT create the impression among our employees that their activities on behalf of the United Food & Commercial Workers Union Local No. 7, United Food & Commercial Workers International Union were under surveillance.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

Wal-Mart Stores, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

600 17th Street, 7th Floor, North Tower, Denver, CO 80202-5433

(303) 844-3551, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-3554.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

ANY INTERESTED INDIVIDUAL WHO WISHES TO REQUEST A COPY OF THIS NOTICE OR A COMPLETE COPY OF THE DECISION OF WHICH THIS NOTICE IS A PART MAY DO SO BY CONTACTING THE BOARD'S OFFICES AT THE ADDRESS AND TELEPHONE NUMBER APPEARING IMMEDIATELY ABOVE.